

*United States Court of Appeals  
for the Second Circuit*



**PETITION FOR  
REHEARING  
EN BANC**



# 77-1001

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

Docket No. 77-1001

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

—v.—

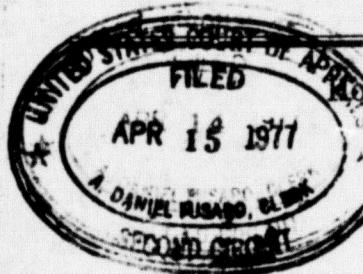
SALVATORE LARCA,  
*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**APPELLANT LARCA'S PETITION FOR REHEARING  
AND SUGGESTION FOR REHEARING EN BANC**



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**Preliminary Statement**

Defendant was convicted, after a jury trial before Hon. Robert L. Carter, of conspiring to violate 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) and 952(a) and of a substantive offense under 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A). Defendant Larca was sentenced to a term of fifteen-years imprisonment on each count, the terms to run concurrently. On April 4, 1977, defendant's appeal was argued before a panel of this Court, consisting of Ellsworth A. Van Graafeiland, Circuit Judge, and Hon. Milton Pollack and Hon. Jacob Mishler, District Judges sitting by designation. The convictions were affirmed from the bench.

## Introduction

Since this court wrote no opinion,\* the conventional grounds for a petition for rehearing are absent here. The grounds urged are rather that the affirmance from the bench in this case was not only a wrong disposition but was also an improper procedure, creating an appearance of injustice to the defendants and posing a threat to the institutional morality of the judicial system. As appears below, substantial issues were raised on the appeal that involved important questions under the Federal Rules of Evidence. That such significant questions should not elicit studious deliberation and a written opinion exacerbates the unfortunate impression, already pervasive among the defense bar, that a narcotics defendant cannot secure a serious review in the ~~Second~~ Circuit Court of Appeals. Such a brusque affirmance is particularly unfortunate when two members of the panel were district court judges sitting by designation. A rehearing *en banc*, whatever the outcome, is necessary to reassure the profession and the community that narcotic defendants are not to be excluded from the orderly process of a reasoned, published application of principles and rules to the record under review.

## Grounds of Appeal

Defendant advanced numerous points on appeal. This petition will not reopen most of those issues but will concentrate on the major ground that, we submit, was both incorrectly and unreasonably disposed of in the affirmance from the bench.

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\* The court made a brief statement. Counsel have written to the Clerk, requesting a copy of this statement, but it has not yet been received.

## ARGUMENT

### **The District Court Erred In Excluding The Records Of The Einstein Methadone Hospital Maintenance Clinic, Which Demonstrated That The Prosecution's Key Witness Gave Perjured Testimony As To Material Facts.**

Boriello was the government's chief witness. While his testimony did not implicate Madonna at all, it was heavily inculpatory of Larca. Boriello testified that he had made three trips to Thailand in connection with planning and executing the heroin importation. The connection with Larca was said to have stemmed from Boriello's giving Larca a sample of heroin he brought back from the first trip. While the government had ample documentary evidence to establish Boriello's second and third visits to Thailand, it had no evidence at all to corroborate that he ever made the alleged first visit.

The defense produced records from the Einstein Methadone Clinic that showed that Boriello was in New York receiving treatment at the clinic on the dates when he had said he was making his first visit to Thailand. The judge admitted these records into evidence, but, before they could be put to the jury, reversed himself on the basis of a conference held in chambers with certain representatives from the Einstein Clinic. The reversal was on the ground that the records were not reliable. The defense pointed out that the officials present at the conference were not those who had made the records or who had the best knowledge and requested the opportunity to summon and examine the officials who had made the records. The judge refused on the ground that this would "delay" the trial. Subsequently, on post-verdict motions, the defense produced further records, showing

even more clearly that Boriello was in New York and not Thailand at the crucial time. Nevertheless, the post-verdict motion was peremptorily denied.

Recollection of this court's statement at the time of affirmance is that it characterized the trial court's procedure as "unfortunate" but found that the defense had failed to object. This court presumably referred to the defense not objecting to the court's holding an *ex parte* conference with the Einstein officials, but surely the more relevant point is that the defense did object strenuously to the reversal of the ruling without an opportunity to examine the makers of the records. It is not within the unreviewable discretion of a trial court to exclude business records that have a tendency to impeach in a crucial way the testimony of the witness on whom the government's case stands or falls. This amounted to a denial of the defendant's constitutionally guaranteed rights to confrontation and compulsory process.

As demonstrated in our main brief, the admission of the Einstein records would have clearly changed the outcome of this case. The admission of these records hinged on their trustworthiness. Both Appellee and Appellant agreed that the question of trustworthiness was a threshold issue which must, in the first instance, be resolved by the trial judge. *United States v. William Robinson*, — F.2d — (2d Cir. 1976), slip op. 333. We, however, alleged that the issue must be determined initially in an adversary proceeding. By refusing to even write an opinion on the subject, this Court, in an unseemly rush to judgment, condoned the tactics used by the District Court, and, we submit, sanction the admission of evidence with no regard to the procedures created by the Federal Rules of Evidence.

Here the defendant was sentenced to 15 years in prison and raised, we submit, substantial issues on appeal arising out of the new Federal Rules of Evidence which have not yet been authoritatively interpreted by courts of appellate jurisdiction. Under these circumstances, we most respectfully submit that this court rectify its erroneous summary disposition by granting rehearing by this court sitting *en banc*.

### **CONCLUSION**

**The appeal of the defendant Larca should be re-heard by this court sitting *en banc*.**

Respectfully submitted,

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